State of Wisconsin: **Circuit Court:** **Waukesha County**

State of Wisconsin,

Plaintiff,

v. Case No.

John Doe,

Defendant.

Defendant's Brief in Support of Request for Involuntary Intoxication Instruction

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Background

The defendant, John Doe (hereinafter "Doe") is charged with operating under the influence of an intoxicant, third offense. Briefly, the criminal complaint alleges that Doe drove his car into a pole at the side of the road and, when he was approached by the police, they noticed that Doe was very unsteady on his feet, confused, and otherwise appeared very intoxicated.

Doe has retained an expert witness, John Q. Public, Pharm.D., who filed a report offering the opinion that, "after taking a dose of zolpidem at 8PM on January 31, 2010, Mr. Doe experienced a well recognized paradoxical adverse effect to this drug and non-volitionally engaged in driving his vehicle resulting in his hitting the pole . . . This is an unpredictable effect of zolpidem and Mr. Doe could not reasonably anticipate it would occur on January 31, 2010, nor was he able to make volitional decisions during this period of time because of zolpidem."

Doe intends to request an involuntary intoxication instruction at trial. The State opposes Doe's request.

As will be set forth in more detail below, Doe will present sufficient evidence which, when viewed in the light most favorable to Doe, suggests that Doe's intoxication was *involuntary* (because the medication was prescribed by a doctor); and, also, the intoxication was significant enough to cause Doe to be unable to distinguish between right and wrong at the time he was driving (in the words of Doe's expert, Doe's actions were "non-volitional"). The fact that operating under the influence of alcohol is a strict liability offense does not preclude the giving of the instruction. Public policy does not permit the state to impose criminal penalties on behavior that is non-volitional.

Argument

I. There is sufficient evidence, when viewed in the light most favorable to Doe, to require the court to give the involuntary intoxication instruction.

A. Jury intructions generally

In deciding whether to give an involuntary intoxication instruction, the court is obligated "to determine whether the evidence reasonably requires it." *Larson v. State*, 86 Wis. 2d 187, 195 (Wis. 1978) The court makes no credibility determination; rather the court is bound to view the evidence in the light most favorable to the defendant. *Ibid.*

Here, the State concedes that where prescription medication is taken according to the physicians' orders, any resulting intoxication is, in fact, involuntary. This concession is well founded since it is nothing less than what is required by *State v. Gardner*, 230 Wis. 2d 32, 40 (Wis. Ct. App. 1999).

The only remaining question, then, is whether, in viewing the evidence in the light most favorable to Doe, there is reason to believe that Doe was incapable of distinguishing between right and wrong at the time he was driving his car that night. Doe's expert will offer the opinion that, at the time he was driving his car, Doe was in an Ambien induced "parasomnilic state" in which he was unconscious of his actions

(i.e. they were “nonvolitional”).

There is nothing patently implausible about this opinion; and, therefore, it is difficult to understand the State’s objection.

B. The instruction is not precluded by the fact that OWI is a strict liability offense.

Evidently, the root of the State’s objection is that operating under the influence of alcohol is a strict liability offense and, therefore, involuntary intoxication cannot, as a matter of law, be a defense. For this peculiar proposition, the State cites to an unpublished Wisconsin decision in which the defendant mixed a prescription drug with alcohol, and he first raised the issue of an involuntary intoxication instruction in postconviction filings[1]; and it is also based on several out-of-state opinions, none of which is factually similar to the present case.

The flaws in the State’ s objection are conspicuous.

Firstly, the involuntary intoxication statute does not speak to the defendant’s *mens rea*; rather, the statute requires that the state of intoxication, “[r]enders the actor incapable of *distinguishing between right and wrong* in regard to the alleged criminal act at the time the act is committed.” In holding that a strict liability statute does not preclude the application of statutory defenses, the Supreme Court explained:

> We conclude that recognizing a defense of legal justification does not necessarily conflict with the concept that violation of a traffic law is a strict liability offense. The basic concept of strict liability is that culpability is not an element of the offense and that the state is relieved of the burdensome task of proving the offender' culpable state of mind. When the defendant in the case at bar claims legal justification, he is not seeking to disprove a statutorily required state of mind. Instead he is claiming that even though he knowingly violated the law, his violation was privileged under the circumstances.
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> While the original rationalization of the defenses of self-defense, coercion, necessity and entrapment "may have been based on the notion that moral culpability was absent . . . the real basis for the defenses is that the conduct is justified because it preserves or has a tendency to preserve some greater social value at the expense of a lesser one in a situation where both cannot be preserved." Remington and Helstad, The Mental Element in Crime -- A Legislative Problem, 1952 Wis L Rev 644, 655. See also *Moes v. State*, 91 Wis. 2d 756, 768, 284 N.W.2d 66 (1979); La Fave and Scott, Criminal Law, sec. 48, p

[1] *State v. Alswager,* 2011 WL 14585477

372 (1972).

State v. Brown, 107 Wis. 2d 44, 53-54 (Wis. 1982).

Let us assume for the moment that, in the present case, it is true that Doe took his medication as prescribed, and he then he went to bed. Later, he got out of bed in a "parasomnilic" state, as described by Doe's expert, in which Doe was essentially unconscious of his activities. Doe then drove his car.

Under such circumstances, what would be the societal interest in punishing Doe for driving under the influence of a controlled substance? There is, obviously, no point in punishing someone for violating a law while he is sleep-walking (unconscious).[2]

Thus, the motive for the State's objection seems to be the fact that the prosecutor simply *does not believe* that Doe was, in fact, sleep-walking. This is a question for the jury, though-- not for the prosecutor or the court. As mentioned above, in deciding whether to grant an instruction, the court must view the evidence in the light most favorable to the defendant. Doing so here clearly requires the court to instruct the jury as to involuntary intoxication.

Conclusion

For these reasons, it is respectfully requested that the court grant Doe's request for the involuntary intoxication instruction.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

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[2]The Supreme Court, in *Brown, supra*, 107 Wis. 2d at 56, admonished prosecutors as follows: "In strict liability offenses, perhaps more than in other types of offenses, the legislature relies on prosecutors to exercise their discretion in determining whether or not to prosecute. While we do not mean to imply that prosecution was unwarranted in this case, we take this opportunity to note again the importance of the judicious exercise of prosecutorial discretion in prosecution. Prosecutorial discretion can achieve the flexibility and sensitivity which, of necessity, are lacking on the face of a statute imposing strict liability. The prosecutor is not required to prosecute all cases in which it appears that the law has been violated. This court has characterized the prosecutor's charging discretion as "quasi-judicial," in the sense that it is his duty to administer justice rather than to obtain convictions. The legislature and the people rely on the prosecutor to exercise discretion to prosecute only those persons who appear deserving of a penalty. SCR 20.34(2) (j) (k) (1982)

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:_____
Jeffrey W. Jensen
State Bar No. 1012529

735 W. Wisconsin Ave.
Suite 1200
Milwaukee, WI 53233

414.671.9484